California Western Law Review

Volume 24 | Number 1 Article 5

1987

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## INTRODUCTION

University and college students today take much pride in their education because of the hard work, time, and money that goes into obtaining a degree. This investment of time and money gives students more than just a passing stake; it creates an "interest" in their education. Courts have recognized that this interest cannot be taken away without due process of law.[1]

Imagine a university student, having spent sixteen years of his life in school, being expelled just prior to graduation for disciplinary reasons without being given the opportunity to present his side of the story. Twelve years ago, the United States Supreme Court recognized that this expulsion cannot occur without first giving the student a chance to present his case before the university.[2]

But just how beneficial is a hearing if the student stands alone against the forces of a long-established institution? A student appearing before a university disciplinary board needs the guidance and assistance of a trained attorney. The student's interest can only be protected if the student is represented at the hearing by an attorney. Without professional assistance, the student could easily be brushed aside by the bureaucracy, never to be heard from again.

The case which supports this proposition regarding the amount of process due a student at a disciplinary hearing is *Marin v. University of Puerto Rico*.[3] *Marin* requires that at a *minimum*, a university student being disciplined has the right to obtain and be represented by an attorney at the hearing.[4]

Currently, courts are divided on whether to allow students to obtain an attorney for disciplinary hearings. Three basic ap-

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* B.A. University of Nevada, Las Vegas, 1985; J.D. California Western School of Law, 1987.

1. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

2. Goss v. Lopez, 419 U.S. 565 (1975).

3. 377 F. Supp. 613 (1974).

4. *Id.* at 623-24.

proaches are now being used: 1) allow an attorney to appear at the hearing, but only in an advisory capacity;[5] 2) allow an attorney to participate and represent the student at the hearing; and 3) refuse to allow an attorney to appear at all.[6] The courts are in a state of disarray on this issue with each jurisdiction creating its own rules.

The majority of cases in this area hold that students at disciplinary hearings have no absolute right to have an attorney present their case.[7] In *Nash v. Auburn University*,[8] students attending Auburn University's College of Veterinary Medicine were charged with "academic dishonesty."[9] At their disciplinary hearing, the students were allowed to bring counsel, but he was not allowed to participate directly in the proceeding. Instead, counsel was limited to a purely advisory role.[10] On appeal, the district court found no circumstances to warrant a departure from what it called the majority position of limiting counsel's role in such proceedings to that of an advisor.[11] *Nash* is a step in the right direction in that it allows a student to bring an attorney with him to his disciplinary hearing. However, *Nash* does not go far enough since limiting the attorney to the role of advisor is of little help to students.

The student in *Hart v. Ferris State College*[12] was charged with off-campus violations of the college's "Misconduct and Discipline Policy and Procedures."[13] As in *Nash*, the student was allowed to

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5. *See, e.g.*, Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

6. *See, e.g.*, Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967); Barker v. Hardway, 283 F. Supp. 228 (S.D.W.V. 1968); General Order on Judicial Standards, 45 F.R.D. 133, 147-48.

7. Nash v. Auburn Univ., 621 F. Supp. 948, 957 (D.C. Ala. 1985).

8. *Id.* at 948.

9. *Id.* at 948. Some of the students were charged with giving assistance during an examination, while other students were charged with receiving this assistance by communication from the other students. The specific charge in part was, "giving or receiving assistance or communications . . . during the anatomy examination on or about May 16, 1985." *Id.* at 951.

10. *Id.* at 952. During the hearing, the students presented opening statements, rebutted the witnesses against them, presented their own witnesses in defense, and responded to the Board members' questions (the same basic elements of a criminal trial). Yet the attorney obtained by the students to help them was limited to merely giving advice to the students. The attorney was not permitted to participate directly in the proceedings. *Id.*

11. *Id.* at 957-58. The court even went so far as to state that the students were afforded more, not less, than the constitution requires. The court implied that even if the students were denied counsel altogether they would still have no due process claim. *Id.*

12. 557 F. Supp. 1379 (W.D. Mich. 1983).

13. *Id.* at 1380. The full text of the provision was as follows:

MISCONDUCT. The following categories of misconduct may arise in the student's relationship as a member of the college community. Enumeration of specific offenses within a category is illustrative, not restrictive. Included also are aiders and abettors, as well as those individuals who threaten or attempt to commit offenses.

OFF-CAMPUS VIOLATIONS. Further disciplinary or restricting action may be taken when

bring an attorney to the disciplinary proceeding, but the attorney was not allowed to cross-examine witnesses on behalf of the student. The student appealed, claiming that the college deprived her of her right to "a hearing at which plaintiff receives the effective assistance of counsel, including the right to examine witnesses and taken an active role in the proceedings."[14] On appeal, the court determined that due process provided only that a student have an attorney present for advice and consultation, not that the attorney could question witnesses for the student.[15]

*Jaska v. Regents of the University of Michigan*[16] explains why some courts believe students do not have a constitutional right to have an attorney participate in their disciplinary hearings. In *Jaska*, at a hearing in which he was not represented by counsel, a student was suspended from the university for cheating on an examination.[17] The student appealed claiming at least the right to a student lawyer. The court, however, listed three reasons why the student was not denied due process. First, the court determined that the proceedings against the student were not unduly complex.[18] Second, the court found it significant that the university did not proceed against the student through an attorney.[19] Finally, the court determined that the student was able to present his case effectively to the Academic Judiciary and therefore suffered no disadvantage due to the lack of representation.[20]

The purpose of this article is to propose that the standards of

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the student is on property other than the college campus and when the individual is: (a) obstructing or interfering with the activities of the college; (b) claiming to represent or act in behalf of the college when not authorized to so represent or to so act; (c) in violation of federal, state, or local laws, which materially and adversely affects the individual's suitability as a member of the college community. *Id.* at 1380 n.1.

14. *Id.* at 1381. This was one of five procedural due process claims appealed by the student. Another included the right to "a hearing at which plaintiff will have an opportunity to confront her accusers and examine their testimony, with the assistance of counsel." *Id.*

15. *Id.* at 1387-88. The court felt that under the guidance of her attorney, the student could probably make whatever points through the questioning of witnesses that her attorney could; it would just be done in a less efficient manner. *Id.*

16. 597 F. Supp. 1245 (E.D. Mich. 1984).

17. *Id.* at 1247. A professor received an anonymous telephone call from a student who said he saw plaintiff switch exam cover sheets, and submit his cover sheet with a classmate's statistics exam. *Id.*

18. *Id.* at 1252. The court felt that the Manual of Procedures for the Academic Judiciary, which was written in plain English, was sufficient to guide the student through the Academic Judiciary proceedings. Additionally, the court felt that the student was helpfully guided by his two visits to the dean's office to ask questions about the proceedings. *Id.*

19. *Id.* The University's case was presented by Professor Rothman, the statistics teacher whose exam the student was accused of cheating on. *Id.* The court did not address the level of education Professor Rothman had completed, nor did the court explain how much training and experience Professor Rothman had in Academic Judiciary proceeding.

20. *Id.*

due process set forth in *Marin* be adopted nationwide. This would give all public university or college students who appear before a disciplinary board or committee the right to obtain and be represented by legal counsel. First, this article briefly examines the differences between educational disciplinary hearings and academic hearings. Second, it presents the history of disciplinary hearings and the requirement of due process. Third, it explores the two fundamental interests a student has in his education: property and liberty. Finally, once it can be established that a university student has a substantial interest in his education, this article looks at what due process rights must be afforded the student before that interest in his education may be taken away.

## I. Disciplinary Hearings versus Academic Hearings

The difference between a disciplinary hearing and an academic hearing focuses on the charges against the student. While the former deals with student misconduct, the latter deals with a student's failure to attain minimum standards of academic excellence.[21] The Supreme Court first recognized a difference between disciplinary and academic hearings in 1978 in *Board of Curators of the University of Missouri v. Horowitz*.[22] *Horowitz* indicates that the degree of due process to which a student is entitled depends on the characterization of the dismissal as either "academic" or "disciplinary."[23] The case dealt with a medical student being expelled from school because of her poor "academic performance."[24]

The Supreme Court, however, is often criticized for its classification of *Horowitz* as an academic dismissal.[25] The school dismissed the student for, among other things, erratic attendance at clinical sessions and her lack of critical concern for personal hygiene.[26] These were not viewed by the court as misconduct, but rather as important factors in the school's determination of whether a student would make a good medical doctor.[27] Mr. Jus-

21. Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 87 (1978).
22. 435 U.S. 78 (1978).
23. Comment, *Due Process Rights of Students: Limitations on Goss v. Lopez - A Retreat out of the "Thicket,"* 9 J.L. & E. 449, 451 (1980).
24. Horowitz, 435 U.S. at 91 n.6. The Court stated that "[t]he record leaves no doubt that respondent was dismissed for purely academic reasons." *Id.*
25. *See, e.g.*, Comment, *supra* note 23.
26. *Horowitz*, 435 U.S. at 81.
27. *Id.* at 91 n.6. The Court noted, "[q]uestions of personal hygiene and timeliness, of course, may seem more analogous to traditional fact-finding than other inquiries that a school may make in academically evaluating a student. But in so evaluating the student, the school considers and weighs a variety of factors, not all of which, as noted earlier, are adaptable to the fact-finding hearing." *Id.*

tice Marshall dissented on this point explaining that in the minutes of the meeting at which it was first decided that the student should not graduate, it was said that "this issue is *not one of academic achievement*, but of performance."[28] The dissent continued that the relevant point was that the student was dismissed largely because of her conduct.[29]

The distinction between academic hearings and disciplinary hearings is an important one. The Supreme Court in *Horowitz* adopted the view established by lower courts that formal hearings need not be held in cases of academic dismissals.[30] The Court noted on the other hand, however, that disciplinary hearings sufficiently resemble traditional judicial and administrative fact-finding processes to require a hearing.[31]

When disciplinary hearings first arose in the 1920s, both the state and federal courts recognized that there were distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons. Hearings were used in the former case but not the latter.[32] Courts reasoned that dismissal for academic reasons called for far less stringent procedural requirements[33] because determining whether a student has fallen below the standard of excellence in his studies is an easier task than determining misconduct.[34]

Disciplinary proceedings are by their very nature more complex because they involve adjudicating offenses which might be deemed "criminal." The university brings charges against the student, wit-

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28. *Id.* at 103 (emphasis in original). The minutes quoted by Justice Marshall read: "This issue is not one of academic achievement, but of performance, relationship to people and ability to communicate." *Id.*

29. *Id.* at 104. Justice Marshall commented that only one of the reasons voiced by the school for deciding not to graduate the student had any arguable nonconduct aspects, and that reason, "clinical competence," was plainly related to perceived deficiencies in the student's personal hygiene and relationships with colleagues and patients. *Id.* at n.17.

30. *Id.* at 87-88.

31. *Id.* at 88-89. Two reasons noted by the Court for this conclusion are: 1) for a period of over 60 years, state and federal courts unanimously held that formal hearings before decision-making bodies need not be held in the case of academic dismissals, and 2) a school is an academic institution, not a courtroom or administrative hearing room. *Id.*

32. *Id.* at 87. The Court stated that "[a] public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship." *See also* Barnard v. Inhabitants of Sheburne, 216 Mass. 19, 22-23, 102 N.E. 1095, 1097 (1913).

33. *Horowitz*, 435 U.S. at 86. In recognizing this, the Court concluded that after "considering all relevant factors, including the evaluative nature of the inquiry and the insignificant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment." *Id.* at 86 n.3.

34. *Id.* at 87. The determination of whether a student's grades are up to standards is a relatively simple matter. Requiring that a student be able to retain an attorney for a "criminal" hearing might well interfere with the university process.

nesses are called to support the charges, and the student generally is given an opportunity to present a defense.[35] Since the disciplinary process is complex, the student is likely to be intimidated because of his youth and lack of skills in an adjudicatory proceeding. In this type of hearing, a student needs the guidance, help, and expertise of a professional litigator to protect his interests.

## II. HISTORY

Courts have unanimously held that a student being suspended or expelled for disciplinary reasons is entitled to due process of law.[36] Once it was determined that due process applied, the question remained of what process are students due?[37]

The standards adopted for due process in disciplinary hearings were established in the landmark case of *Dixon v. Alabama State Board of Education*.[38] At Alabama State College, there was an organization responsible for civil rights demonstrations. The organization was led by twenty-nine Negro students.[39] The organization participated in several demonstrations, the most important of which occurred when several Negro students went to a courthouse and asked to be served at the white lunch counter, then a violation of Alabama state law.[40] These demonstrations resulted in the expulsion of nine students and the suspension of 20 others.[41] Each of the nine expelled students received notice of their expulsion *after* the school had decided the students could no longer attend.[42] None of the students were afforded the opportunity to re-

35. Goss v. Lopez, 419 U.S. 565, 583-84 (1975).

36. *See, e.g.*, Dixon v. Alabama State Bd. of Educ. 294 F.2d 150 (5th Cir. 1961); *Goss*, 419 U.S. 565 (1975).

37. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

38. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

39. *Id.* at 154. Investigation into the conduct of the organization was made by Dr. Trenholm, as President of the Alabama State College, the Director of Public Safety for the State of Alabama under the directions of the Governor, and by the investigative staff of the Attorney General for the State of Alabama. Their reports on the civil rights organization led to the identification of the students responsible for the demonstration.

40. *Id.* at 152-53. The district court found that on February 25, 1960, "approximately twenty-nine Negro students, including these six plaintiffs, according to a prearranged plan, entered as a group a publicly owned lunch grill located in the basement of the county courthouse in Montgomery, Alabama, and asked to be served. Service was refused; the lunchroom was closed; the Negroes refused to leave; police authorities were summoned; and the Negroes were ordered outside where they remained in the corridor of the courthouse for approximately one hour." *Id.* at 152-53 n.3.

41. *Id.* at 154. No formal charges were made against the students.

42. *Id.* The students received a letter from the Alabama State College, signed by President H. Councill Trenholm, which read in part:
"Dear Sir: This communication is the official notification of your expulsion from Alabama State College as of the end of the 1960 Winter Quarter." *Id.* at 154 n.2.

but any charges against them at a hearing.[43]

On appeal, the court of appeals established that, "[W]henever a governmental body acts so as to injure an individual, the constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved."[44] The court held that due process in this context requires notice and an opportunity for a hearing before a student is expelled for misconduct.[45]

This same view was adopted by the Supreme Court in 1975 in *Goss v. Lopez*.[46] *Goss* dealt with six high school students who were each suspended for ten days because of disruptive or disobedient conduct.[47] None of the students were given a hearing to determine the operative facts underlying their suspension.[48] Although *Goss* dealt with the suspension of *high school* students for misconduct, the Supreme Court explained that at the very minimum, students facing suspension and consequent interference with a protected property interest[49] must be given *some* kind of notice and afforded *some kind* of hearing *prior* to suspension or expulsion.[50]

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43. *Id.* at 154. Plaintiff Dixon testified:

"Q. Did the president or any other person at the college arrange for any type of hearing where you had an opportunity to present your side prior to the time you were expelled? A. No."

The testimony of Governor Patterson, Chairman of the State Board of Education, included:

"Q. Were these students given any type of hearing, or were formal charges filed against them before they were expelled? A. They were — Dr. Trenholm expelled the students; they weren't given any hearing." *Id.* at 154-55 n.4.

44. *Id.* at 155.

45. *Id.* at 158. *See also* Comment, *Dismissal of Students: "Due Process"*, 70 HARV. L. REV. 1406 (1957).

The nature of the hearing, however, according to the court should vary depending upon the circumstances of the particular case. The court determined that this case requires "something more than an informal interview with an administrative authority of the college." *Dixon*, 294 F.2d at 158.

46. 419 U.S. 565 (1975).

47. *Id.* at 569. One of the students was among a group of students demonstrating in the school auditorium while a class was being conducted there. He was ordered by the school principal to leave and when he refused to do so he was suspended.

Another student physically attacked a police officer in the presence of the principal. Four other students were suspended for similar conduct. *Id.*

48. *Id.* at 570. The students were afforded the opportunity to attend a conference, together with their parents, *subsequent* to the effective date of their suspension to discuss the students' future. *Id.*

No testimony was given as to what would happen to the students if they did not attend this conference.

49. A university student's property interest will be examined later in this article. *See infra* notes 55-65 and accompanying text.

50. *Goss*, 419 U.S. at 579 (emphasis in original). Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right they must first be

Three years after *Goss*, in *Horowitz*, the Supreme Court once again stressed the importance of due process in disciplinary proceedings. Although *Horowitz* involved an academic hearing, the Court nevertheless noted that a "student at a tax-supported institution cannot be arbitrarily *disciplined* without the benefit of the ordinary, well-recognized principles of fair play."[51]

Today, *Dixon*, *Goss*, and *Horowitz* form the foundation which requires procedural due process at disciplinary hearings for students. However, each of these cases failed to establish any requirements beyond adequate notice and a hearing. This left lower courts to determine what other, if any, due process requirements are fundamentally due students at disciplinary hearings. Specifically, the issue arises whether a student has the right to retain counsel[52] and have that experienced attorney speak on behalf of the student and represent him at his disciplinary hearing.

## III. University Students' "Interest" in Higher Education[53]

As noted earlier, the amount of procedural requirements necessary to satisfy due process depends on the interests of the parties involved.[54] The stronger the interest a student has in his education, the stronger the need becomes for procedural requirements to protect that interest. University students have two major interests in their education; property and liberty.

### *A. Property Interest*

The fourteenth amendment of the U.S. Constitution forbids states from depriving any person of life, liberty, or property without due process of law.[55] High school students, like those in *Goss*, have little problem invoking the fourteenth amendment's due process safeguards since all but one of the states[56] have compulsory education laws.[57] These laws, however, do not apply to higher edu-

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notified. *Id.*

51. *Horowitz*, 435 U.S. at 88 n.4.

52. What the Supreme Court said on the issue of students' rights to retain counsel at disciplinary proceedings in *Goss* and *Horowitz* is examined later in this article.

53. This article only examines a *public* university student's interest in his education because it is a well-settled rule that the relationship between a student and a *private* university is a matter of *contract*. *See* Anthony v. Syracuse Univ., 224 N.Y. App. Div. 487, 231 N.Y.S. 435 (1928).

54. *See supra* notes 36-37 and accompanying text.

55. U.S. Const. amend. XIV.

56. *See* Comment, *supra* note 23, at 458. Mississippi has no compulsory education statute. *See generally* Comment, *Students Rights and Due Process: Procedural Requirements of Goss v. Lopez*, 46 Miss. L.J. 1041, 1046 (1975).

57. The Supreme Court recognized that the state is constrained to recognize a stu-

cation. It is often noted, therefore, that "the right to attend a public college or university is not in and of itself a constitutional right."[58] Despite this, the district court in *Jaksa* cited *Goss* in determining that a university student may have a property interest in continuing his education.[59] In fact, some courts hold that students do have a property interest in higher education. Courts rely on the fact that states establish public university school systems for their students and a property interest is recognized by state law.[60] They also rely upon dictum by the Supreme Court in *Horowitz* which assumed the existence of a property interest for university students.[61]

In 1985, the Supreme Court once again assumed the existence of a property interest in a student's higher education in *Regents of the University of Michigan v. Ewing*.[62] In *Ewing*, a medical student was dropped from registration in a medical program when he failed five of seven subjects on his examination.[63] The Supreme Court stated that, as in *Horowitz*, it would "assume the existence of a constitutionally protectible property right."[64] The Court went on to hold that such a right entitled the student to continued enrollment free from arbitrary dismissal.[65] Thus, some courts seem to suggest that students have a cognizable property interest in their higher education within the meaning of the fourteenth amendment.

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dent's legitimate entitlement to a public education as a property interest which is protected by the due process clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause. *Goss*, 419 U.S. at 574.

58. *Dixon*, 294 F.2d at 950; *See also* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1961).

59. *Jaska*, 597 F. Supp. at 1247.

60. *See Horowitz*, 435 U.S. at 82.

61. In *Horowitz*, the Court assumed "the existence of a liberty or property interest" for students in their education and concluded that "respondent has been awarded at least as much due process as the Fourteenth Amendment requires." *Horowitz*, 435 U.S. at 84-85. This language is used by many litigators today in an attempt to establish that a university student does have a property interest in his education.

For a contra view (that university students do not have a property interest in their education) *see* Comment, *supra* note 23.

62. 106 S. Ct. 507 (1985). Although *Ewing* can be classified as an "academic" disciplinary case, for the purposes of establishing a property interest in education, the distinction need not be made.

63. *Id.* at 508. The examination is known as "NBME Part I." The student was dismissed when he failed this examination with the lowest score recorded in the history of the program. *Id.* at 507.

64. *Id.* at 512. The Court noted that under Michigan law, Ewing may have enjoyed a property right and an interest in his continued enrollment in the medical program. *Id.* at 512 n.8.

65. *Id.* at 512. The Court eventually held, however, that Ewing was not arbitrarily dismissed and that he was afforded the protection required by due process. *Id.* at 514.

### B. Liberty Interest

Even assuming that a university student has no property interest in his education, it is widely held[66] that university students hold a strong liberty interest in their education.[67] In *Dixon*, the court explained that "[i]t requires no argument to demonstrate that education is vital and, indeed, basic to civilized society" to invoke the liberty interest.[68] The court added that the precise nature of the interest involved in disciplinary cases is the right to remain at a public institution of higher learning where the student has sufficient grades to otherwise comply with academic standards.[69] The court was concerned with the possibility of arbitrary action against the students. The court stated that the due process clause forbids arbitrary deprivations of liberty[70] such as those that can occur when a student is suspended from school without first having a hearing.

Through the years, courts have divided this liberty interest into two areas: 1) the student's right to an education to obtain an adequate livelihood and 2) the right to further one's education. In either situation, where a person's good name, reputation, honor, or integrity is at stake the requirements of the due process clause are invoked.[71]

*1. Adequate Livelihood—Dixon* defined a liberty interest in education as giving students the possibility to excel in life as a result of their schooling.[72] An extended suspension or exclusion from school deprives a student of important liberties.[73] The rationale is that long absences from school threaten the student with inability to keep up with his classes and that the loss of a year's work and of incentive threaten the continuation of his educational career.[74] Without a proper education, the ex-student will find it

66. *Goss*, 419 U.S. at 574; *Dixon*, 294 F.2d at 157; Marin v. University of P.R., 377 F. Supp. 613 (D.C.D.P.R. 1974); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

67. U.S. CONST. amend XIV.

68. *Dixon*, 294 F.2d at 157. *See also Goss*, 419 U.S. at 576 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)) ("education is perhaps the most important function of state and local governments.").

69. *Id.* at 157.

70. *Goss*, 419 U.S. at 574.

71. *Id.*; *see also* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Additionally, liberty interests include the right to be free from arbitrary and capricious actions. *See generally* Goss v. Lopez, 419 U.S. 565 (1975).

72. "Without [a] sufficient education the [students] would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." *Dixon*, 294 F.2d at 157.

73. Givens v. Poe, 346 F. Supp. 202, 208 (W.D.N.C. 1972).

74. *Id.* at 208. One court noted that "it goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma." Vought v.

harder to obtain a good job and attain an adequate livelihood for himself and his family.

In *Horowitz*,[75] the Court was reluctant to decide whether a student has a liberty interest in his education. Chief Justice Rehnquist[76] commented that it was not necessary to decide that issue.[77] However, in his dissent, Justice Marshall noted that when a student has devoted years of preparation to an education, the student should not be deprived of his education without affording him a high level of protection.[78]

*2. Continuing Education*—If a student is expelled from a university or college, he probably will not be able to continue his education at another university or college.[79] Students have the right or interest to continue their training at a university of their choice.[80]

To deprive a student of his further education is to deprive him of a liberty. The term liberty includes the right to engage in any common occupation of life, to acquire useful knowledge and generally to enjoy those privileges which are guaranteed to every person.[81]

## IV. Right of Students to be Represented by an Attorney

Since the Supreme Court assumes that a student has a property interest in his education[82] and since the Supreme Court as well as other courts recognize a strong liberty interest in a student's edu-

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Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969).

If the effect of expulsion is that drastic in high school, one can only imagine the lasting effects a student would have after being expelled from a college or university.

75. Decided by a plurality of the Supreme Court.

76. At the time of this decision Mr. Rehnquist was an Associate Justice.

77. "We need not decide, however, whether respondent's dismissal deprived her of a liberty interest in pursuing a medical career. Nor need we decide whether respondent's dismissal infringed any other interest constitutionally protected against deprivation without procedural due process." *Horowitz*, 435 U.S. at 84.

78. "As Judge Friendly has written in a related context, when the state seeks 'to deprive a person of a way of life to which [s]he has devoted years of preparation and on which [s]he . . . ha[s] come to rely,' it should be recognized first to provide a 'high *level* of procedural protection.'" *Id.* at 100. (Marshall, J., concurring in part and dissenting in part) (quoting "Some Kind of Hearing." 123 U. Pa. L. Rev. 1267, 1296-97 (1975)).

79. Marin v. University of P.R. 377 F. Supp. 613, 622 (D.C.D.P.R. 1974).

80. Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961).

81. *Marin*, 377 F. Supp. at 621. The right to engage in a chosen occupation is meaningless if one is unable to obtain the training it requires. Likewise, the right to acquire useful knowledge implies a right of access to institutions dispensing such knowledge. *Id.* at 622.

82. *Horowitz*, 435 U.S. at 84-85; *Ewing*, 106 S. Ct. at 512.

cation,[83] this interest cannot be deprived without due process of law.[84] Once it is determined that due process applies, the question remains what process is due?"[85]

Before a university can deprive students of a property or liberty interest, it must satisfy certain requirements.[86] A delicate balance must be achieved between the authority of the university to regulate student conduct and the constitutional rights of students.[87]

Students lose no constitutional rights by virtue of their status as students.[88] However, it is unclear whether the "right" of a student to obtain counsel to represent him at a disciplinary hearing is a constitutional right. In a criminal hearing, the student as a defendant would be entitled to counsel.[89] As a result of a university's disciplinary hearing, although the school could not incarcerate a student, the school could *deprive* him of a liberty that could affect his life for years to come.

The liberty lost by the student could be his chance to continue his education at a university[90] or his chance to excel in life as a result of the schooling.[91] Although the student will not be locked in a jail, the ramifications of a university's expulsion could drastically affect the student's present and future.

Moreover, the disciplinary hearing system pits the overreaching power of a university board with little to lose against the substantial education interest of the student. In this situation fundamental rules of fair play, fundamental fairness, and due process require that the student be allowed to obtain an attorney to represent him.

*Marin v. University of Puerto Rico*[92] fully recognizes this re-

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83. *See, e.g., Goss*, 419 U.S. at 574; *Dixon*, 294 F. 2d at 157; *Marin*, 377 F. Supp. at 621; *Givens* v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

84. *Jaksa*, 597 F. Supp. at 1248, stated: "Whether plaintiff's (a university student's) interest is a "liberty" interest, "property" interest, or both, it is clear that he is entitled to the protection of the due process clause."

85. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

86. *Dixon*, 294 F.2d at 158. The question presented by this article then becomes an issue, does due process allow a college or university disciplinary board the right to refuse a student the opportunity to bring an attorney to the disciplinary hearing and have that attorney participate?

87. *Marin*, 377 F. Supp. at 621. This article does not propose to "handcuff" universities in their regulation of student conduct. Creation and adoption of disciplinary rules are not an issue being addressed. The problem arises when these rules are applied and enforced against students. It is only at this time that the student should be entitled to have his attorney participate in the university's attempt to regulate student conduct.

88. *Id.* at 620.

89. The right to an attorney attaches only in cases where the accused's punishment will put him in jail. Scott v. Illinois, 440 U.S. 367 (1979).

90. *Marin*, 377 F. Supp. at 621.

91. *Dixon*, 294 F.2d at 157. Excelling in life includes the opportunity to fulfill as completely as possible the duties and responsibilities of good citizens.

92. 377 F. Supp. 613 (D.C.D.P.R. 1974).

quirement. In *Marin*, full time university students were suspended for more than one year for incidents which were in violation of the General Rules and Regulations for the Students of the University of Puerto Rico.[93] These incidents included students opposing the administration's conduct of a campus election, wrongfully entering a conference of the dean, distributing leaflets denouncing the campus election, and picketing the Administrative Building.[94]

At a hearing before the disciplinary board, the students were allowed to be represented by counsel and to have the counsel participate in the proceeding.[95] At the conclusion of the hearing, the students brought an action to challenge the university's power to regulate conduct.

The court first recognized the students' strong liberty interest in their education[96] by noting the opportunity education gives a student to obtain an adequate livelihood. The court also recognized the students' right to further their education.[97]

The court went on to state that the standards of due process that must be afforded "depend on the nature of the interests affected and the circumstances of the deprivation."[98] Since the court recognized a significant student interest in education and the potential loss by suspension, it ruled that the right to obtain and be represented by counsel was a *minimum* requirement of due process.[99] The court took special measures to explain that its decision "merely establishes the *minimum* requirement of due process."[100] The court went so far as to state that a student had a right to

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93. *Id.* at 616. The "General Rules and Regulations for the Students of the University of Puerto Rico" is used to regulate the conduct of all the university students. *Id.*

94. *Id.* at 618. At the disciplinary hearing, some of the charges were not adequately proved and were subsequently dropped. *Id.*

95. *Id.* It is not known if the charges that were dropped can be directly attributed to the participation of the attorney. It seems more probable than not that the attorney's participation played a substantial role in the dismissal of the charges. This further goes to show the vital importance of having an attorney participate in disciplinary hearings.

96. *Id.* at 621. "Due process protection is particularly necessary when, as here, the governmental action may damage the individual's standing in the community, academic or general, or may impose a stigma or other disability that forecloses his freedom to take advantage of other educational or future employment opportunities." *Id.* at 622.

97. *Id.* at 622. "Suspension from a public college is a mark on one's record that may well preclude further study at any public and many private institutions and limit the positions one can qualify for after termination of one's studies." *Id.*

98. *Id.* at 622-23. *See also Morrissey*, 408 U.S. at 481; Stanley v. Illinois, 405 U.S. 645, 651 (1972); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 866, 895 (1961).

99. "[N]o sound reason appears why, in light of the individual's *significant interest*, these state goals, however important, need be vindicated in the normal case without . . . (2) a full, expedited evidentiary hearing . . . (e) *with the assistance of retained counsel* . . ." (emphasis added). *Marin*, 377 F. Supp at 623-24.

100. *Id.* at 624. The court also noted that its definition of the minimum standards of procedural due process is not designed as the description of the only salutary standards. *Id.*

retain counsel at an *informal* preliminary hearing.[101] The court recognized the substantial interest a student has in his education by the time he reaches the university level and ruled he should not be deprived of that interest without due process of law.

Taking *Marin* to the opposite end of the educational spectrum, *Givens v. Poe*[102] held that two *elementary* school students who were expelled from school for disciplinary reasons had the right to obtain counsel and have that counsel represent them at a disciplinary hearing. The court held that if a student could be suspended from school for a considerable time as a result of a disciplinary hearing, that student has the right to be represented by counsel at the hearing.[103] Like *Marin*, the *Givens* court, stressed the importance of procedural due process at disciplinary hearings. The court stated that "[n]ot all courts have expressly required all the items listed above,[104] but all items do appear essential if both the substance and the appearance of *fairness* are to be preserved."[105]

*Givens* states that the right to obtain counsel is a protection *elementary* students must have to preserve their due process. If an elementary school student who has one to five years of education to preserve has the right to counsel, certainly a university student with twelve to twenty years of education at stake should similarly be afforded such right at disciplinary hearings.[106] *Marin* recog-

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101. *Id.* at 623-24. If due process allows a student to have his attorney participate in an informal hearing, then constitutionally, due process should allow a student to have his attorney participate in any type of formal hearing regarding the student's rights.

102. 346 F. Supp. 202 (W.D.N.C. 1972).

103. "[W]here expulsion or suspension for any considerable period of time is a possible consequence of proceedings, modern courts have held that due process requires a number of procedural safeguards such as: "(5) the right to be represented by counsel (though not at public expense)." *Id.* at 209.

104. The items referred to by the court were:

"(1) notice to parents and student in the form of a written and specific statement of the charges which, if proved, would justify the punishment sought; (2) a full hearing after adequate notice and (3) conducted by an impartial tribunal; (4) the right to examine exhibits and other evidence against the student; (5) the right to be represented by counsel (though not at public expense); (6) the right to confront and examine witnesses; (7) the right to present evidence on behalf of the student; (8) the right to make a record of the proceedings; and (9) the requirement that the decision of the authorities be based upon substantial evidence." *Id.*

105. *Id.* "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969).

106. As previously noted, once a university student is expelled from school his chances of continuing on at another institution are slim. An elementary school student, by contrast, probably won't have to face the same threatening reality. Elementary school students have a state protected interest in their education. The state would not likely prevent a student from going to school for his entire life. It is also much easier for an elementary

nizes the fundamental right to counsel for students at disciplinary hearings. However, it represents a minority position among the courts today.

Since the Supreme Court in *Goss* refused to decide whether students have the right to have attorneys speak for them at disciplinary hearings,[107] lower courts have been able to adopt their own rulings on this issue. Most courts have chosen to adopt the position enunciated by the Second Circuit. In *Madera v. Board of Education of New York*,[108] a junior high school student wished to have an attorney attend a *post-suspension* conference. When this request was denied, the Maderas obtained a temporary restraining order prohibiting the school from holding any proceeding in which the Maderas may be affected.[109] On appeal, the restraining order was removed.[110] The court determined the student had no right to be represented at the guidance conference by an attorney.[111]

Many distinctions, however, can be drawn between *Madera* and disciplinary proceedings of a university student. First, *Madera* was decided prior to *Goss*, which requires students to have a hearing *prior* to suspension.[112] Second, the guidance conference in *Madera* was "[a]t the most . . . a very preliminary investigation, if . . . an investigation at all."[113] The guidance conference is usually held *after* the suspension has taken place. Finally, the *Madera* court expressly stated that "[w]hat due process may require *before* a child is expelled from public school . . . is not before us."[114]

University students today must be afforded a hearing *before* they are expelled from school. That hearing will be *adjudicatory* by nature to determine what type of conduct the student has displayed and whether that conduct is punishable. Since adjudicatory hearings are more complex than guidance conferences, students

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school student to transfer to another school than for a university student who has been expelled for disciplinary reasons.

107. *Goss*, 419 U.S. at 583. The reason for this decision was because brief disciplinary suspensions, according to the Court, are almost countless. "To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places." *Id.*

It is important to note that the Court was referring to high schools and not universities.

108. 386 F.2d 778 (1967).

109. *Id.* at 780. Specifically, the Maderas were trying to stop the "Assistant Superintendent's Hearing" already scheduled unless their legal counsel was permitted to be present and to perform his tasks as an attorney. *Id.*

110. *Id.* at 789.

111. *Id.* at 784-89.

112. *See supra* notes 47-51 and accompanying text.

113. *Madera*, 386 F.2d at 785.

114. For these reasons, *Madera* should not be relied upon by proponents who wish to keep university students from obtaining attorneys to represent them at disciplinary hearings. *Id.* at 788 (emphasis added).

need more help to protect the deprivation of important interests.[115]

*Baker v. Hardway*[116] is a case frequently cited with *Madera* to deny students the right to obtain counsel at disciplinary hearings. There, several state college students were to appear, prior to disciplinary proceedings, before one of several committees that were investigating the students' conduct.[117] The students could bring with them as an advisor a faculty member, a fellow student, or parents,[118] but not an attorney. These committee hearings were similar to the guidance conferences in *Madera*, except that the committee hearing occurred prior to any disciplinary action.[119]

The court described the committee as having "none of the attributes of a judicial body, since its only function was to gather information and make recommendations which had no binding effect on the president and faculty or on the Board of Education."[120] As such, the court stated that the student might not have the right to an attorney during a purely investigatory state.[121] However, the court noted that when there is a hearing which is adjudicative in nature, a student may be entitled to the guidance and assistance of counsel.[122]

This situation is analogous to criminal proceedings which use the "critical stage" test established by the Supreme Court in *Coleman v. Alabama* to determine if the presence of counsel is mandated.[123] An accused must be represented by an attorney if he is at a "critical stage" in the criminal process. The Supreme Court has determined that a preliminary hearing, where initial facts are presented, is a "critical stage" and therefore an attorney must be provided to an accused.[124] A disciplinary hearing can be more crucial to a student than a preliminary hearing in a criminal action. If an accused loses a preliminary hearing, none of his rights or interests will be lost. He will simply advance to the next

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115. Although *Goss* has overruled *Madera* in part, *Madera* still stands for the proposition that students are not allowed to be represented by attorneys at disciplinary hearings.

116. 283 F. Supp. 288 (S.D.W.V. 1968).

117. *Id.* at 234. The students were being disciplined for putting on a demonstration during the halftime of the homecoming football game. Approximately two hundred students, the majority of whom were Negroes, demonstrated by marching back and forth on the playing field, carrying placards and chanting themes denouncing the school's dean. The demonstration was peaceful and non-violent. *Id.* at 231-32.

118. *Id.* at 234.

119. *Id.* at 236-37.

120. *Id.*

121. *Id.* at 238. This is similar to a criminal proceeding. *See, e.g.*, U.S. v. Gouveia, 467 U.S. 180 (1984).

122. *Id.* at 238. The court used as a guideline the rules of procedure adopted by the Commission on Civil Rights as discussed in Hannah v. Lorche, 363 U.S. 420 (1960).

123. 399 U.S. 1 (1970).

124. *Id.*

stage of the criminal process. If a disciplinary hearing goes against the student, he could immediately lose his entire liberty and property interests in his education. For this reason, a disciplinary hearing, like a preliminary hearing, is a "critical stage" for the accused student. Accordingly, he should be afforded the opportunity to obtain counsel to represent him in the hearing.

The Supreme Court in *Goss* has stopped short of determining whether students have the right to obtain counsel to represent them at disciplinary proceedings.[125] The Court made it clear, however, that it was only addressing the issue of a short suspension. "[W]e should . . . make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures."[126] The Court was reluctant to deny high school students the right to obtain counsel for disciplinary hearings when the suspension was *only ten days or less*. This implies that when greater student interests are at stake, significantly greater safeguards may be required, including the right to attorney representation, at disciplinary hearings.

When *Horowitz* was decided three years later, the Supreme Court still had not established the student's right to obtain an attorney.[127] However, logic dictates that a university student, who has a greater interest than high school students, should not be denied the right to obtain counsel when his suspension could be permanent.

Since the university system is more complex than high school or elementary school systems, more due process should be afforded the university student at a disciplinary hearing. In *Goss*, the Court was reluctant to make a ruling on the right to obtain counsel because "brief disciplinary suspensions (in high school) are almost countless."[128] The Court also stated that "high schools are vast

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125. The Court said, "we stop short of construing the due process clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel . . . ." *Goss*, 419 U.S. at 583.

126. *Id.* at 584.

127. "The presence of attorneys or the imposition of rigid rules of cross-examination at a hearing for a student . . . would serve no useful purpose, notwithstanding that the dismissal in question may be of a permanent duration." *Horowitz*, 435 U.S. at 86 n.2.

128. *Goss*, 419 U.S. at 583; *see, e.g.*, Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972), where the court cited statistics for the number of expulsions and suspensions from 1968 to November, 1971, in one school system:

| *Expulsions* | | *Suspensions* | |
|---|---|---|---|
| 1968-69 | 37 | 1968-69 | 1,541 |
| 1969-70 | 24 | 1969-70 | 3,224 |
| 1970-71 | 32 | 1970-71 | 6,568 |
| 1971-72 | 48 | 1971-72 | 1,098 |

and complex."[129] Universities, on the other hand, do not make it a routine practice to suspend or expel students.

In his dissent in *Horowitz*, however, Mr. Justice Marshall compared the magnitude of deprivation of a student of higher education being expelled with the mere suspension of a high school student. "As the court recognizes, the 'private interest' involved here is a weighty one: 'the deprivation to which respondent was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension to which the high school students were subjected in *Goss*."[130]

## V. CONCLUSION

By the time a student reaches college, he has put a substantial amount of time, money, and effort into his education. This interest in a student's education is one which should not be deprived without due process of law. Due process in disciplinary actions should include the right of the student to have his own attorney present and participate in the disciplinary hearing.

As in criminal actions, the greater the interests that are being deprived, the greater the amount of due process required. By the time a student reaches the university level, he has a *substantial* interest in his education. This is an interest that should not be taken away without the student being afforded proper protection.

Disciplinary hearings are very similar to criminal hearings. They require that charges be brought, witnesses testify, and cross-examinations be conducted. A student should not be forced to represent himself at such a proceeding since he has so much to lose. As Justice Douglas once stated: "Today's mounting bureaucracy . . . promises to be suffocating and repressive unless it is put into the harness of procedural due process. One who need not explain the response for his actions can operate beyond the law. One who need not even hear a complaint from the citizen can turn sheer power into an arbitrary force. Bureaucrats who can, without hearings, ride hard on the people they are supposed to serve, are able to dispense with the concept of equal protection and make their *ipse dixit* the law."[131] At a disciplinary hearing for a university student, fundamental fairness and due process require that the student be allowed to obtain counsel to represent and participate on behalf of the student at that hearing.

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129. *Goss*, 419 U.S. at 580.

130. *Horowitz*, 435 U.S. at 100 (Marshall, J., concurring in part and dissenting in part).

131. Spady v. Mount Vernon Housing Auth., 419 U.S. 985 (1974) (Douglas, J. dissenting from denial of cert.).